(5)

No. 96-6839

In The

Supreme Court of the United States

October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Title 8, Section 1326(b), United States Code, defines offenses separate from the offense defined in Section 1326(a), so that an alien defendant's previous conviction or convictions must be alleged in the indictment and proved at trial beyond a reasonable doubt before an enhanced sentence may be imposed?

2. Whether a sentencing court violates due process by determining that Title 8, Section 1326(b)(2) is not a separate offense from Title 8, Section 1326(a), but rather merely a sentencing enhancement of that offense?

LIST OF PARTIES

1. United States of America
2. Hugo Roman Almendarez-Torres

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JURISDICTION

The decision of the court of appeals (J.A. 18) was announced on August 22, 1996. The petition for certiorari was filed on November 20, 1996. Certiorari was granted on March 31, 1997. (J.A. 22) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial, by an impartial jury, . . . , and to be informed of the nature and the cause of the accusation; . . . " U.S. Const. amend. VI.

STATUTORY PROVISIONS INVOLVED

The full text of the version of Section 1326 of Title 8, United States Code, which was in effect on the date Petitioner's offense was alleged to have occurred is set out in Appendix A to this Brief. The various sets of amendments to Section 1326 are set out in Appendix B to this brief, beginning at page B-1.[1]

STATEMENT

On September 12, 1995, the Petitioner, Hugo Roman Almendarez-Torres, was charged in a single count indictment with illegal reentry into the United States in violation of Title 8, United States Code, Section 1326.[2] (J.A. 3) On December 1, 1995, Petitioner entered a plea of guilty to the indictment. (J.A. 1)

[1] With respect to these amendments, in each case deleted text is lined through, and added text is indicated in boldface type.

[2] Particularly, Petitioner was charged with being found in the United States on or about July 28, 1995, having reentered the United States illegally (without the permission of the Attorney General) at some time prior to that date, but subsequently to his deportation on or about April 18, 1992. (J.A. 3)

Prior to sentencing, the Probation Office prepared a presentence investigation report, which stated that the maximum sentence for the offense to which Petitioner had pleaded was 15 years imprisonment. Petitioner filed written objections to the presentence investigation report, urging that the offense to which he had pleaded guilty was merely a "simple" illegal reentry after deportation, as proscribed by Title 8, United States Code, Section 1326(a) – which carried a maximum penalty of only two years imprisonment. At sentencing on March 1, 1996, the district court overruled Petitioner's objections, and proceeded to sentence Petitioner to, among other things, 85 months imprisonment in the custody of the Bureau of Prisons. (J.A. 17)

The Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit. On August 22, 1996, that court entered its opinion affirming the judgment of conviction and sentence, relying on that court's previous decision in *United States v. Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993), *cert. denied*, 510 U.S. 1076 (1994). (J.A. 18-19)

This Court granted certiorari on March 31, 1997. (J.A. 22)

SUMMARY OF ARGUMENT

I.

Analysis of the language, structure, and legislative history of § 1326 compels the conclusion that, in § 1326(b)(1) and (b)(2), Congress intended to create new

offenses, separate and distinct from the offense described in § 1326(a), rather than sentencing enhancements of the § 1326(a) offense.

A. In deciding this question, the lower federal courts have principally utilized two somewhat different approaches. The first of these is that used by the Fifth Circuit in the precedent governing that court's decision in this case: namely, an analysis of the language and structure of § 1326 in light of four factors extracted from this Court's decision in *Garrett v. United States*, 471 U.S. 773 (1985). The second approach is a broader-based analysis of the language, structure, and legislative history of § 1326. Under either of these approaches, this Court should find that Congress intended that § 1326(b)(1) and (2) were to be new, independent offenses, rather than just sentencing enhancements of the offense set out in § 1326(a).

B. The language and structure of § 1326 – particularly when viewed in light of the statutory evolution of that provision – demonstrate Congress's intent to make § 1326(b)(1) and (b)(2) separate offenses. When Congress added (b)(1) and (2) in 1988, it put them in a separate subsection from the offense described in (a), and declined to label this subsection "Penalties," as it has so often done in other statutes. In 1990, Congress made the language of §§ 1326(a), (b)(1), and (b)(2) parallel, indicating its intent to require parallel treatment of these three provisions, i.e., each as a separate offense.

In 1996, Congress made even clearer its intent that (b)(1) and (b)(2) were separate offenses, and not just sentencing enhancements, when it amended § 1326 by

adding subsections (b)(3) and (b)(4), which are clearly separate offenses. In new subsection 1326(d), Congress also evidenced its intent that the elements of subsection (a) were implicitly incorporated into subsections (b)(1) and (b)(2). Finally, in related legislation directed to the Sentencing Commission, Congress explicitly referred to § 1326(b)(1) and (2) as "offenses."

Because subsequent legislation declaring the intent of Congress with respect to the earlier statute is entitled to great weight in statutory construction, the history of the amendments to § 1326 makes it plain that, in § 1326(b)(1) and (2), Congress intended to create new offenses, not just sentencing enhancements.

C. The same result follows from an analysis of the language and structure of § 1326 in light of the factors identified by this Court in *Garrett*. First, § 1326(b)(1) and (2) do not predicate punishment under those sections on a "conviction" or "violation" of § 1326(a). Rather, these provisions apply "[i]n the case of [an] alien described in [subsection (a)]," which could just as well, or better, be read to simply incorporate by reference all of the elements of (a) into (b)(1) and (2). Second, § 1326(b)(1) and (b)(2) do not "multiply" the penalty received under (a); rather, each of these carries its own discrete penalty, which makes no reference to the penalty in (a).

Nor does the statute in question here provide guidelines for the sentencing hearing – another feature identified by the *Garrett* Court as indicative of a sentencing enhancement rather than a separate offense. Finally, the title of § 1326 sheds no light on the question at issue, since it is at best ambiguous. Accordingly, under the four-

factor *Garrett* analysis used by the court below, § 1326(b)(1) and (2) are best understood as creating independent offenses, rather than just sentencing enhancements of the offense set out in § 1326(a).

D. To the extent that legislative history may be consulted to divine Congressional intent with respect to this question, the available legislative history in this case is unhelpful and therefore does not alter the conclusion reached above that Congress intended for § 1326(b)(1) and (b)(2) to comprise separate offenses.

E. Even if the Petitioner's reading of the statute is not deemed to be compelled by the language and structure of the statute, that reading is nonetheless compelled by the rule of lenity, since the text, structure, and legislative history fail to establish that the government's position is unambiguously correct.

F. Finally, this Court's analysis should be informed by the venerable principle that, where two constructions of a statute are possible, the Court has the duty to select the construction which avoids grave and doubtful constitutional questions. Because the construction given by the Fifth Circuit in this case raises such questions, this Court should avoid the constitutional questions by ruling in Petitioner's favor as a matter of statutory construction.

II.

The Fifth Circuit's construction of § 1326 in this case – namely, that § 1326(b)(1) and (b)(2) are only sentencing enhancements, not separate offenses – violates the constitutional rights to (1) grand jury indictment in a federal

case, proof beyond a reasonable doubt, and due process under the Fifth Amendment to the Constitution, and (2) trial by jury and notice of the nature of the charges under the Sixth Amendment.

A. The determinative fact of a prior felony conviction or prior aggravated felony conviction, under § 1326(b)(1) and (2) respectively, requires punishment of up to 10 or 20 years imprisonment respectively – that is, either five or ten times the maximum term of imprisonment authorized in the absence of proof of this fact. Because the determinative fact of a prior felony or aggravated felony conviction results in a drastically greater statutory maximum sentence, the Constitution requires that such fact must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

B. A crime has always been understood to be composed of two parts: the facts which comprise the prohibited conduct and the punishment therefor. Thus, whether labeled as "elements" or not, each of the facts that would justify the punishment must be alleged in the indictment and proved beyond a reasonable doubt, to satisfy the defendant's right to a grand jury indictment for, and proof beyond a reasonable doubt of, a "crime," and his right to a jury trial in a "criminal prosecution."

The punishment attached to the proscribed conduct has always determined the amount of process due before a person may be subjected to that punishment. Here, the drastically increased level of punishment caused by proof of the fact of a prior felony or aggravated felony under § 1326(b)(1) or (2) requires the highest degree of due process available, to-wit: proof beyond a reasonable

doubt and the rest of the panoply of rights attendant upon proof of a criminal offense.

C. At common law, as reflected in numerous decisions of this Court and lower federal and state courts, the nearly universal historical practice was that, where prior convictions raised the statutory maximum punishment – as is the case here – those convictions had to be alleged in a charging instrument, and proved to a jury beyond a reasonable doubt. This historical tradition from the common law informs this Court's interpretation of the Constitution, and requires that the Court hold this practice to be compelled by the Constitution.

D. In fact, this Court's decisions establish that when the legislature has determined that the existence of a fact will raise the maximum punishment, that fact must be alleged in the indictment and proved beyond a reasonable doubt to a jury. Moreover, in order to prevent the erosion of the fundamental protections at issue, including, notice, grand jury indictment, proof beyond a reasonable doubt, and jury trial, this Court should exercise its supervisory powers in this case. The Court's supervisory powers must be guided by the common law, state and federal authority, and considerations of justice, which compel the conclusion that the aggravated felony referred to in 8 U.S.C. § 1326(b)(2) must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

The Court should therefore hold that a defendant may not be punished under § 1326(b)(1) or (2) unless the prior felony or aggravated felony is alleged in an indictment, and proved beyond a reasonable doubt.

ARGUMENT

I. AS A MATTER OF STATUTORY CONSTRUCTION, 8 U.S.C. § 1326(b)(1) AND (b)(2) MUST BE READ AS CREATING SEPARATE AND DISTINCT OFFENSES FROM THE OFFENSE DESCRIBED IN 8 U.S.C. § 1326(a), RATHER THAN SENTENCING ENHANCEMENTS OF THE OFFENSE DESCRIBED IN § 1326(a).

A. Introduction.

In the present case, Petitioner argued below "that he was charged with and pleaded guilty to [8 U.S.C.] § 1326(a), simple reentry [after deportation], but that he was sentenced as if he had pleaded guilty to reentry following a conviction for an aggravated felony for purposes of § 1326(b)(2)." *United States v. Almendarez-Torres*, No. 96-10254, slip op. at 1 (5th Cir. Aug. 22, 1996). (J.A. 18-19) However, the Fifth Circuit rejected Petitioner's claim on the basis of its prior decision in *United States v. Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993), *cert. denied*, 510 U.S. 1076 (1994). *Almendarez-Torres*, *id.* at 1-2. (J.A. 18-19)

In *Vasquez-Olvera*, a divided panel of the Fifth Circuit held that 8 U.S.C. § 1326(b)(2) did not create a separate criminal offense, but rather was only a sentencing enhancement of the offense described in § 1326(a). *Vasquez-Olvera*, 999 F.2d at 945-47. Judge King dissented. Judge King found that neither the language and structure of § 1326(b), nor the legislative history surrounding the enactment of that provision, clearly demonstrated Congress's intent with respect to this question. *Id.* at 947-49 (King, J., dissenting). Judge King then concluded that, in

light of this ambiguity, it was appropriate to apply the rule of lenity and to hold that § 1326(b)(2) created a separate criminal offense, rather than just a sentencing enhancement. *Id.* at 949-50 (King, J., dissenting).

The majority of courts have agreed with the majority opinion in *Vasquez-Olvera*, holding that § 1326(b)(1) and (2) are not separate criminal offenses and that, therefore, the "felony" and "aggravated felony" components of § 1326(b)(1) and (b)(2) respectively need not be alleged in the indictment, nor proved beyond a reasonable doubt.[3] The Ninth Circuit, however, has squarely held that § 1326(b)(1) and (b)(2) create separate criminal offenses from that described in § 1326(a), and that the "felony" and "aggravated felony" components of the former provisions are elements which must be pleaded in the indictment and proved beyond a reasonable doubt before a defendant may be sentenced under those provisions.[4]

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[3] *See United States v. Valdez*, 103 F.3d 95, 97-98 (10th Cir. 1996); *United States v. Haggerty*, 85 F.3d 403, 405-06 (8th Cir. 1996); *United States v. DeLeon-Rodriguez*, 70 F.3d 764, 766-67 (3rd Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1343 (1996); *United States v. Palacios-Casquete*, 55 F.3d 557, 560 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 927 (1996); *United States v. Cole*, 32 F.3d 16, 18-19 (2nd Cir.), *cert. denied*, 513 U.S. 993 (1994); *United States v. Crawford*, 18 F.3d 1173, 1178-79 (4th Cir.), *cert. denied*, 513 U.S. 860 (1994); *United States v. Forbes*, 16 F.3d 1294, 1300 (1st Cir. 1994); *see also United States v. Muñoz-Cerna*, 47 F.3d 207, 210 n.6 (7th Cir. 1995) (dicta).

[4] *See United States v. Campos-Martinez*, 976 F.2d 589, 591-592 (9th Cir. 1992); *United States v. Gonzalez-Medina*, 976 F.2d 570, 572-73 (9th Cir. 1992); *United States v. Arias-Granados*, 941 F.2d 996, 998 (9th Cir. 1991) ("A prior felony conviction is an element of . . . 8 U.S.C. § 1326. . . . ") (dicta). *Accord Vasquez-Olvera*, 999 F.2d at 947 & 949-50 (King, J., dissenting); *United States v. Vieira-Candelario*, 811 F.Supp. 762, 768 (D.R.I. 1993), *overruled in relevant part by United States v. Forbes*, 16 F.3d 1294, 1300 (1st Cir. 1994).

The courts have differed more widely in the appropriate mode of analysis to use in deciding this question. The Fifth Circuit in *Vasquez-Olvera*, relying on its prior decision in *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986), analyzed the language and structure of § 1326 by looking to a number of factors first articulated in this Court's decision in *Garrett v. United States*, 471 U.S. 773 (1985).[5] *See Vasquez-Olvera*, 999 F.2d at 945-46; *see also id.*

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[5] In *Davis*, the Fifth Circuit applied a number of factors drawn from this Court's decision in *Garrett* to decide a question similar to that presented by this case: i.e., whether the former version of the Armed Career Criminal Act (hereafter "former ACCA") – located at former 18 U.S.C. App. § 1202(a) – created a separate criminal offense from the offense of being a felon in possession of a firearm (which latter offense was set out in the sentence preceding the former ACCA), or whether the former ACCA was merely a sentencing enhancement of the offense contained in the preceding sentence. The circuits were divided on this question as well. *Compare United States v. Rumney*, 867 F.2d 714, 718-19 (1st Cir.) (sentencing enhancement), *cert. denied*, 491 U.S. 908 (1989); *United States v. Dickerson*, 857 F.2d 414, 417 (7th Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989); *United States v. Brewer*, 853 F.2d 1319, 1322-27 (6th Cir.) (same), *cert. denied*, 488 U.S. 946 (1988); *United States v. Rush*, 840 F.2d 574, 577-78 (8th Cir.) (*en banc*) (same), *cert. denied*, 487 U.S. 1238 (1988) *and cert. denied*, 487 U.S. 1239 (1988); *United States v. Blannon*, 836 F.2d 843, 844-45 (4th Cir.) (same), *cert. denied*, 486 U.S. 1010 (1988); *United States v. West*, 826 F.2d 909, 911-12 (9th Cir. 1987) (same); *United States v. Jackson*, 824 F.2d 21, 25-26 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (same), *cert. denied*, 484 U.S. 1013 (1988); *United States v. Hawkins*, 811 F.2d 210, 220 (3rd Cir.) (same), *cert. denied*, 484 U.S. 833 (1987); *and United States v. Gregg*, 803 F.2d 568, 570 (10th Cir. 1986), *cert. denied*, 480 U.S. 920 (1987) *with*

at 947-49 (King, J., dissenting) (also applying *Garrett/Davis* factors). Other courts have supplemented the *Garrett/Davis* analysis with (or eschewed it in favor of) a broader-based analysis of the language, structure, and legislative history of § 1326. *See, e.g., Forbes*, 16 F.3d at 1298 (noting that *Garrett* factors may be helpful, but are not conclusive; *citing Rumney*, 867 F.2d at 718-19). The Ninth Circuit has taken a different tack and has interpreted § 1326 in light of its case law construing 8 U.S.C. § 1325, the statute forbidding illegal entry into the United States. *See Campos-Martinez*, 976 F.2d at 591-92.

In the present case, analysis of the language and structure of § 1326 – including how § 1326 has evolved statutorily – compels the conclusion that § 1326(b)(1) and (b)(2) create new offenses, separate and distinct from the offense described in § 1326(a), rather than sentencing enhancements. This conclusion is bolstered by particular application of the *Garrett* factors to the statutes at issue. Accordingly, the Fifth Circuit erred in holding that § 1326(b)(1) and (b)(2) are merely sentencing enhancements of the offense described in § 1326(a).

Davis, 801 F.2d at 755-56 (5th Cir. 1986) (separate criminal offense). *See also United States v. Brewer*, 841 F.2d 667, 668-69 (6th Cir. 1988) (separate criminal offense), *rev'd in relevant part on panel reh'g*, 853 F.2d 1319, 1322-27 (6th Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); *Brewer*, 853 F.2d at 1327-29 (Merritt, J., dissenting) (separate criminal offense); *Rush*, 840 F.2d 574, 578-80 (Gibson, J., dissenting) (same); *Hawkins*, 811 F.2d at 223-25 (Rosenn, J., dissenting) (same).

B. The Language and Structure of 8 U.S.C. § 1326 – Particularly Viewed in Light of the Statutory Evolution of That Statute by Subsequent Congressional Amendments – Compel the Conclusion That Congress Intended That 8 U.S.C. § 1326(b)(1) and (b)(2) Be New, Separate Offenses, Rather Than Just Sentencing Enhancements of the Offense Described in § 1326(a).

In cases involving statutory interpretation, this Court looks "first to the language of the statute itself." *Hughey v. United States*, 495 U.S. 411, 415 (1990); *see also United States v. Turkette*, 452 U.S. 576, 580 (1981). If the language of the statute does not plainly or unambiguously express the Congressional intent underlying the statute, however, this Court will attempt to divine the Congressional intent from an examination of "the language, structure, and legislative history" of the statute. *Garrett*, 471 U.S. at 779; *see also id.* at 778-85 (conducting such an analysis).

In this case, the language and the structure of § 1326 – particularly the 1988 amendments adding subsections (b)(1) and (b)(2), and subsequent amendments to § 1326 – demonstrate that Congress intended that subsections (b)(1) and (b)(2) were to be new, separate offenses, and not just enhancements of the sentence imposed for an offense under § 1326(a).

1. The 1988 Amendments

The statute at issue in this case – 8 U.S.C. § 1326 – was originally enacted by Congress in 1952.[6] Ch. 477, Title

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[6] The 1952 version of 8 U.S.C. § 1326 is set out at Appendix B-1.

II, ch. 8, § 275, 66 Stat. 229 (June 27, 1952). So the statute remained for over 35 years, until 1988, when the statute was amended to add the particular provisions at issue in this case – § 1326(b)(1) and (b)(2).[7] Pub. L. 100-690, Title VII, § 7345(a), 102 Stat. 4471 (Nov. 18, 1988).

The language and the structure of the 1988 amendments adding subsections (b)(1) and (b)(2) demonstrate that Congress intended that subsections (b)(1) and (b)(2) were to be new, separate offenses, and not just enhancements of the sentence imposed for an offense under § 1326(a). First of all, it is significant that Congress placed the "felony" and "aggravated felony" provisions in their own subsection, with a different letter than that assigned to the original offense of "simple" illegal reentry found in subsection (a).[8] Moreover, "Congress could have easily

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[7] The 1988 amendments are set out at Appendix B-2 through B-3 in the following format: additions to the predecessor version are indicated in bold, and deletions from the predecessor version are struck out. This format will be followed with respect to all of the discussed amendments of § 1326.

[8] *Compare United States v. Ryan*, 9 F.3d 660, 667 (8th Cir. 1993) (finding 18 U.S.C. § 844(i) to be sentencing enhancement, based on, *inter alia*, the fact that "lack of clear division into separate sections suggests treatment of contents as a single offense"), *aff'd on reh'g en banc*, 41 F.3d 361 (8th Cir. 1994) (*en banc*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1793 (1995); *Hawkins*, 811 F.2d at 218-19 (finding former ACCA to be sentencing enhancement based on, *inter alia*, the fact that "the inclusion of the [former ACCA] into the same paragraph as the previously enacted [felon-in possession] statutes, **with no division into separate numbers or letters, suggests treatment of the contents as a single offense**") (emphasis added); *Rumney*, 867 F.2d at 717-18 (same; citing *Hawkins*); *Brewer*, 853 F.2d at 1324 (same;

titled subsection (b) as a separate penalty provision, which it chose not to do; the failure to do so is noteworthy." *Vasquez-Olvera*, 999 F.2d at 949 (King, J., dissenting). Indeed, Congress has frequently done just that, by titling one subsection of a statute the "offense," and another one the "penalty" or "punishment."[9]

In sum, the fashion in which Congress added § 1326(b)(1) and (b)(2) to § 1326 in 1988 indicates that Congress then intended to create new separate offenses, rather than just sentencing enhancements. This conclusion is further supported by the subsequent amendments to § 1326, as discussed below.

2. The 1990 Amendments

Only two years later, Congress amended § 1326 again.[10] Pub. L. 101-649, Title V, § 543(b)(3), 104 Stat. 5059 (Nov. 29, 1990). The 1990 amendments to § 1326 bolster the conclusion that Congress intended § 1326(b)(1) and (b)(2) to create new, separate offenses rather than just sentencing enhancements of the offense contained in § 1326(a). As this Court has noted, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to

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also citing *Hawkins*); *West*, 826 F.2d at 911 (same; also citing *Hawkins*); *Jackson*, 824 F.2d at 23-24 (observing that *Hawkins* "observation ha[s] force").

[9] *See, e.g.*, 21 U.S.C. § 841 (subsection (a) entitled "Unlawful acts"; subsection (b) entitled "Penalties"); 18 U.S.C. § 1091 (subsection (a) entitled "Basic offense"; subsection (b) entitled "Punishment for basic offense").

[10] The 1990 amendments to § 1326 are set out at Appendix B-4 through B-5.

great weight in statutory construction." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 380-81 (1969) (footnote with citations omitted); *see also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (views of subsequent Congresses "entitled to significant weight"). This is "particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding*, 444 U.S. at 596.

The 1990 amendments made two changes confirming Congress's original intention to make (a), (b)(1), and (b)(2) each a separate offense. First, Congress amended subsection (a) so as to make its provisions respecting fine and imprisonment **parallel** with those in (b)(1) and (b)(2). This evidences Congress's intent that (a), (b)(1), and (b)(2) each be treated the same – i.e., as a separate offense. *Cf. Communications Workers of America v. Beck*, 487 U.S. 735, 752 (1988) ("Given the parallel purpose, structure, and language of [one provision], we must interpret that provision in the same manner [as its parallel]."); *Hillsboro Nat'l Bank v. CIR*, 460 U.S. 370, 402 (1983) (given Congressional acquiescence in judicial interpretation of 26 U.S.C. § 337, "we must conclude that Congress intended the same construction of the same language in the parallel provision in § 336.") This conclusion is bolstered by Congress's deletion, in the same amendment, of the language "shall be guilty of a felony," which language had theretofore been found only in (a), and not in (b)(1) or (2). Thus, by its amendments in 1990, Congress made even clearer its original intent that (b)(1) and (b)(2) were meant to describe separate offenses from the offense described in (a).

3. The 1994 and 1996 Amendments

Section 1326 was amended again in 1994.[11] Pub. L. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (Sept. 13, 1994). The principal thrust of these amendments was the increase of the maximum terms of imprisonment prescribed under § 1326(b)(1) and (b)(2), from 5 and 15 years, to 10 and 20 years, respectively. *See id.*

Finally, in 1996, § 1326 was amended twice. The first of these amendments was on April 24, 1996.[12] Pub. L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279 (Apr. 24, 1996). The second 1996 amendment was on September 30, 1996, and was to take effect on the first day of the first month beginning more than 180 days after enactment.[13] Pub. L. 104-208, Div. C, Title III, §§ 305(b)(1)-(3), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 309, 110 Stat. 3009 (Sept. 30, 1996).

The 1996 amendments provide additional support for the proposition that Congress intended for § 1326(b)(1) and (b)(2) to be separate offenses. First, in these amendments, Congress added subsections (b)(3) and (b)(4), which are clearly new offenses, separate from those in subsection (a). The addition of the new offenses in (b)(3) and (b)(4) demonstrates that Congress intended **all** of the divisions of subsection (b) to be separate offenses. It would make very little sense to have § 1326(b) comprised

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[11] These amendments are set out at Appendix B-6 through B-7.

[12] These amendments are set out at Appendix B-8 through B-10.

[13] These amendments are set out at Appendix B-11 through B-13.

of four divisions, two of which were separate offenses, and two of which were only sentencing enhancements for an offense contained in another subsection. Congress's inclusion of the new offenses found in (b)(3) and (b)(4) indicates that it intended parallel treatment of (b)(1) and (b)(2) as separate offenses. *Cf. Communications Workers of America v. Beck*, 487 U.S. at 752; *Hillsboro Nat'l Bank v. CIR*, 460 U.S. at 402.

Furthermore, also in the 1996 amendments, Congress added § 1326(d) respecting collateral attacks of underlying deportation orders. This subsection places conditions on an alien's ability to "challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section. . . . " This is yet another indication that Congress intended for subsection (b)(1) and (b)(2) to be separate and distinct offenses from the one(s) described in (a): if subsection (b) merely contained enhancements of the sentence for the offense described in (a), why would Congress need to refer to both (a) **and** (b) in § 1326(d)?

Also significant is the fact that, unlike the text of subsection (a)(1), the text of subsection (b) does not contain the phrase "deportation order." Any "deportation order" "described in . . . subsection (b)," *see* 8 U.S.C. § 1326(d), is solely through implicit incorporation from subsection (a). Thus, subsection (d) is evidence that Congress intended to incorporate the elements of subsection (a) into subsection (b) – leading to the conclusion that (a) and (b) set out distinct offenses.

Finally, in a piece of related legislation, Congress (in perhaps the plainest expression of its intent) directed the

United States Sentencing Commission to "promptly promulgate, pursuant to section 994 of title 28, United States Code, amendments to the sentencing guidelines to make appropriate increases in the base offense level for **offenses under section 242(e) and 276(b) of the Immigration and Nationality Act (8 U.S.C. 1252(e) and 1326(b))** to reflect the amendments made by section 130001 of the Violent Crime Control and Law Enforcement Act of 1994." Pub. L. 104-208, 110 Stat. 3009, § 334 (Sept. 30, 1996) (emphasis added). By its selection of the term "offenses," Congress made it pellucidly clear that the provisions of § 1326(b) set out separate crimes, with their own elements, rather than sentencing enhancements of the offense contained in § 1326(a).[14] *See United States v. LaBonte*, ___ U.S. ___, 117 S.Ct. 1673, ___, 1997 WL 273644 *12 (May 27, 1997) (Breyer, J., dissenting) ("[T]he word 'offense' is a technical term in the criminal law, referring to a crime made up of statutorily defined elements.").

In sum, the language and structure of § 1326 – especially viewed in light of the history of Congress's amendments to that statute – instruct that Congress intended to create new, separate offenses in § 1326(b)(1) and (b)(2), not mere sentencing enhancements of the offense set out in subsection (a).

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[14] Moreover, the reference is specifically to § 1326(b)(1) and (b)(2) since these were the provisions amended by the 1994 Act. Indeed, subsections (b)(3) and (b)(4) were not even added until 1996.

C. Analysis of the Language and Structure of 8 U.S.C. § 1326 in Light of the Factors Mentioned by This Court in *Garrett v. United States* Does Not Change the Conclusion Reached Above.

The conclusion reached above – i.e., that in § 1326(b)(1) and (b)(2) Congress intended to create new, separate offenses, rather than sentencing enhancements for the offense described in (a) – is not altered by use of the alternative analysis (used by the Fifth Circuit in *Vasquez-Olvera* and hence in this case) under the factors mentioned in this Court's opinion in *Garrett v. United States*. As articulated by the Fifth Circuit in *Vasquez-Olvera*, by way of citation to its prior opinion in *Davis*, *Garrett* sets out "four factors that are helpful in determining whether Congress intended a statutory provision to create an independent federal offense or a sentence-enhancement provision. Those factors are: (1) whether the statute predicates punishment upon conviction under another section, (2) whether the statute multiplies the penalty received under another section, (3) whether the statute provides guidelines for the sentencing hearing, and (4) whether the statute is titled as a sentencing provision." *Vasquez-Olvera*, 999 F.2d at 945, citing *Davis*, 801 F.2d at 756 (additional citation omitted). Each of these will be analyzed in turn.

1. Does the Statute Predicate Punishment upon Conviction under Another Section?

Rather than predicating punishment upon conviction under § 1326(a), it is just as likely, if not more so, "that

the drafters of the 1988 amendments to § 1326 could have intended simply to incorporate the three elements of § 1326(a) into § 1326(b) and simply add the additional element regarding a prior conviction of a felony or aggravated felony." *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting) (footnotes & citation omitted); *accord Forbes*, 16 F.3d at 1298. The Ninth Circuit has no doubt that this was so: " . . . § 1326(a) and (b) stand alone, each with its own elements and sentence provisions." *United States v. Oliver*, 60 F.3d 547, 553-54 (9th Cir. 1995). Moreover, the inference that Congress intended to incorporate the elements of subsection (a) into the provisions of (b) is bolstered by the subsequent passage of § 1326(d), as discussed in Section I.B.3., *supra*.

In this regard, it is also notable that subsection (b) states that it applies "in the case of any alien described in" subsection (a); it does **not** say "in the case of any alien **convicted of**" the offense set forth in subsection (a). *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting). Congress could easily have provided that subsection (b) would apply in the case of a "conviction under subsection (a)" or in the case of a "violation of subsection (a)" – and, indeed, it has used such language in a number of provisions which are unmistakably intended to be sentencing enhancements.[15] As this Court has observed, "When Congress intended that the defendant have been previously convicted, it said so," by explicitly using words like "conviction" or "convicted." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 489 n.7 (1985). That Congress did not do so

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[15] *See, e.g.*, 18 U.S.C. § 924(e); 18 U.S.C. § 3147; 21 U.S.C. § 841(b).

in this case is a strong indication that it did not intend for § 1326(b) to be predicated upon conviction under § 1326(a).

Additionally, the phrase "[i]n the case of an alien described in [subsection (a)]" in § 1326(b) is quite similar to the phrase "[in] the case of a person who receives, possesses, or transports. . . . " contained in the former ACCA. In both instances, the statutes make reference to the case of one who has committed certain conduct. Yet, the courts interpreting the former ACCA had agreed that the quoted phrase from that provision did **not** predicate punishment on, or refer to, conviction under another statute within the meaning of the first *Garrett* factor.[16] Congress's use of the analogous phrase in 1988 must be interpreted against the backdrop of these court cases from the same time period. *Cf. Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

Furthermore, "the use of the phrase '[n]otwithstanding subsection (a),' if anything, argues in favor of holding that the drafters of subsection (b) intended it to be a separate offense." *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting) (footnote omitted). And, as discussed

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[16] *See Davis*, 801 F.2d at 755-56; *see also Rumney*, 867 F.2d at 718 (agreeing that first *Garrett/Davis* factor is not satisfied; citing *Davis*); *Rush*, 840 F.2d at 577 (same); *cf. Jackson*, 824 F.2d at 23-24 (discussing this holding from *Davis* and opining that this "observation ha[s] force").

above, the history of the amendments to § 1326, taken as a whole, indicates that Congress has always intended that § 1326(b)(1) and (b)(2) were separate offenses, not merely sentencing enhancements of the offense set out in § 1326(a).

In sum, there is no indication of any intent to predicate punishment under § 1326(b) upon conviction under § 1326(a). The first *Garrett* factor, therefore, counsels that § 1326(b)(1) and (b)(2) be construed as independent offenses, not sentencing enhancements.

2. Does the Statute Multiply the Penalty Received under Another Section?

The answer to this question is clearly "No": "a separate penalty is set out [in § 1326(b)], rather than a multiplier of the penalty established for some other offense." *Garrett*, 471 U.S. at 781; *cf. Rush*, 840 F.2d at 579 (Gibson, J., dissenting) ("the existence of a discrete offense is indicated by the fact that the provision carries its own penalty, 'rather than a multiplier of the penalty established for some other offense' "; citing *Garrett*). The second *Garrett* factor, therefore, counsels that § 1326(b)(1) and (b)(2) be construed as independent offenses, not sentencing enhancements.

Moreover, as Judge King noted in her dissent in *Vasquez-Olvera*, "[c]ommon sense suggests that a 'multiplier' in the context of a sentencing enhancement statute generally refers to an increase by two or three fold at the most. However the potential for such a draconian increase under subsection (b) – from a maximum of two to fifteen years, i.e., over a seven-fold increase – suggests

that a separate offense was intended."[17] *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting), citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Judge King correctly suggested that construing factors producing such a large increase in punishment as sentencing enhancements, rather than essential elements of new offenses, creates the specter of a sentencing fact's being the "tail which wags the dog of the substantive offense" warned of in this Court's opinion in *McMillan*. *See Vasquez-Olvera*, 999 F.3d at 948 (King, J., dissenting); *see also McMillan*, 477 U.S. at 88. As discussed in more detail below, this Court should certainly construe § 1326(b) in such a fashion as to avoid the thorny constitutional questions adverted to by Judge King: i.e., this Court should hold that, as a matter of statutory construction the "felony" and "aggravated felony" provisions of § 1326(b)(1) and (b)(2) are essential elements of two separate criminal offenses created in those two subsections.

3. Does the Statute Provide Guidelines for the Sentencing Hearing?

It is universally conceded that § 1326(b) does not satisfy this third *Garrett* factor. *See, e.g., Vasquez-Olvera*, 999 F.2d at 945. This is yet another indication that

[17] Since the time of Judge King's dissent, the increase described by her as "draconian" has become even more so. In 1994, the penalties for a violation of § 1326(b)(1) and (b)(2) were increased from 5 and 15 years imprisonment, to 10 and 20 years imprisonment, respectively. Pub. L. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (Sept. 13, 1994). Thus, the seven-fold increase described by Judge King has now become a ten-fold increase.

§ 1326(b)(1) and (b)(2) were intended to constitute new, independent offenses rather than just sentencing enhancements.

4. Is the Statute Titled as a Sentencing Provision?

The individual subsections of § 1326 are not separately titled, and the title of § 1326 sheds no light on the question at hand. At the time relevant to this case, § 1326 was entitled "Reentry of deported aliens; criminal penalties for reentry of certain deported aliens."[18] Although the title might plausibly be construed as setting out one substantive crime in subsection (a) and additional sentencing enhancements in subsection (b), "a competing interpretation is equally permissible. The bifurcated structure of § 1326 and the apparent incorporation of the elements of subsection (a) into subsection (b) might also suggest that Congress intended the broad title of the offense ('reentry of deported alien') to apply to both separate offenses in the different subsections."[19] *Forbes*,

[18] Under the second set of 1996 amendments, the title of § 1326 has been changed to "Reentry of removed alien; criminal penalties for reentry of certain removed aliens." Pub. L. 104-208, Div. C, Title III, §§ 308(e)(14), 309, 110 Stat. 3009 (Sept. 30, 1996).

[19] Moreover, the presence of the word "penalties" in the title is of very little significance, since Congress has frequently placed substantive offenses into subsections of statutory sections entitled "Penalties." For example, 18 U.S.C. § 924 is entitled "Penalties"; yet, this Court has held that § 924(c) describes a separate offense, not just a sentencing enhancement. *See Simpson v. United States*, 435 U.S. 6, 10 (1978). *See also, e.g.*, 8 U.S.C. § 1306; 18 U.S.C. § 844.

16 F.3d at 1298, *citing Vasquez-Olvera*, 999 F.2d at 949 (King, J., dissenting); *cf. Vieira-Candelario*, 811 F.Supp. at 767 (statute's title is, at best, ambiguous).

Indeed, "Congress could have easily titled subsection (b) as a penalty provision, which it chose not to do; the failure to do so is noteworthy." *Vasquez-Olvera*, 999 F.2d at 949 (King, J., dissenting). Congress not only knows how to do so, but has in fact frequently done so.[20] The absence of such language here suggests that Congress "apparently incorporated subsection (a)'s elements into subsection (b) suggesting that subsection (b) was intended to be independent of subsection (a)." *Id.*

In sum, the language and structure of § 1326 compel the conclusion that, in 8 U.S.C. § 1326(b)(1) and (b)(2), Congress intended to create new, independent criminal offenses, rather than just sentencing enhancements for the already-existing offense in subsection (a). Analysis of the four factors gleaned from this Court's decision in *Garrett* supports this conclusion. Accordingly, this Court should find that § 1326(b)(1) and (b)(2) create new offenses, and that the "felony" and "aggravated felony" provisions of those subsections are essential elements which must be pleaded in the indictment and proved beyond a reasonable doubt.

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[20] *See* footnote 9, *supra*.

D. Even If It Is Permissible to Consult Legislative History to Clarify a Textually Ambiguous Statute, the Legislative History Surrounding the Provisions at Issue Here is Not Helpful.

The courts have noted that there is no legislative history which sheds any light on this subject. *See Forbes*, 16 F.3d at 1298; *Vasquez-Olvera*, 999 F.2d at 946 n.5; *see also id.* at 949 (King, J., dissenting); *cf. Campos-Martinez*, 976 F.2d at 592 ("We do not find [§ 1326(b)'s] legislative history useful in this case."). Thus, to the extent that legislative history may be consulted to divine the legislative intent behind a textually unclear legislative pronouncement,[21] the legislative history does not alter the conclusion reached above – that Congress intended for § 1326(b)(1) and (b)(2) to comprise new federal offenses, not merely sentencing enhancements of the offense in § 1326(a).

E. At Best, the Statute in Question is at Least Ambiguous; and, in that Case, the Rule of Lenity Requires that § 1326(b)(1) and (b)(2) Be Read as Creating New Offenses.

As set forth above, the language and structure of § 1326, viewed through the prism of the amendments to that statute, plainly establish that Congress intended to

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[21] *But see United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.) ("[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history.").

create new, separate offenses in § 1326(b)(1) and (2), not merely sentencing enhancements of the offense described in (a). Whether or not one agrees with this position, however, one thing is certainly clear – the language, structure, and legislative history of the statute in question do **not** establish that the government's contrary position is unambiguously correct. To paraphrase Justice Scalia, "[e]ven if the [Court] does not consider the issue to be as clear as [Petitioner] do[es], [it] must at least acknowledge . . . that it is eminently debatable – and that is enough, under the rule of lenity, to require finding for the petitioner here." *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting). "In these circumstances – where text, structure, and history fail to establish that the Government's position is unambiguously correct – [this Court] appl[ies] the rule of lenity and resolve[s] the ambiguity in [the petitioner's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994), *citing Bass*, 404 U.S. at 347-49; *see also Ladner v. United States*, 358 U.S. 169, 177 (1958). Therefore, should any doubt remain as to whether § 1326(b)(1) and (b)(2) were intended by Congress to create new offenses, the rule of lenity nevertheless compels that conclusion. *See Vasquez-Olvera*, 999 F.2d at 949-50 (King, J., dissenting) (dissent would hold that rule of lenity compels conclusion that § 1326(b)(1) and (b)(2) set out separate offenses, not just sentencing enhancements).

F. Construing § 1326(b)(1) and (b)(2) as Independent Offenses Rather Than Sentencing Enhancements Is Consistent With the Canon of Statutory Construction Requiring Courts to Choose a Plausible Construction Which Avoids Serious Constitutional Problems.

This Court has long held that "where a statute is susceptible of two constructions, by one of which grave

and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (citation omitted). Thus, " '[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' " *United States v. LaFranca*, 282 U.S. 568, 574 (1931), *quoting United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (other citations of authority omitted). *See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 628-29 (1993) (referring to this rule of statutory construction as a "hoary one" and collecting authorities).

As demonstrated in the discussion in Section II., *infra*, to hold that Congress intended for § 1326(b)(1) and (b)(2) to be only sentencing enhancements rather than independent offenses raises difficult constitutional questions about the constitutional limitations of Congress's power to circumvent the requirements of grand jury indictment, jury trial, due process, and proof beyond a reasonable doubt by calling a critical fact a "sentencing factor" rather than an essential "element" of a criminal offense. This Court can, and should, avoid these difficult questions by construing § 1326(b)(1) and (b)(2) as separate criminal offenses rather than as sentencing enhancements of the offense set out in § 1326(a).

II. THE CONSTITUTION REQUIRES THAT, IN A FEDERAL CASE, WHENEVER THE MAXIMUM IMPRISONMENT RANGE IS INCREASED BASED ON A FACT, THAT FACT MUST BE ALLEGED IN THE INDICTMENT AND PROVED BEYOND A REASONABLE DOUBT IN A JURY TRIAL.

A. Introduction.

A major problem with the Fifth Circuit's analysis in *Vasquez-Olvera*, is that it ignores the traditional rule that facts which increase the maximum sentence must be alleged in the formal charging document, and proved beyond a reasonable doubt. The traditional rule is based on fundamental rights guaranteed by our Constitution. A crime is made of two parts, the facts that constitute the prohibited act and the penalty for those facts. When the existence of a fact raises the statutory maximum sentence, the defendant is entitled to have that fact alleged in the indictment and proved to a jury beyond a reasonable doubt.

In 8 U.S.C. § 1326(b)(2), the determinative fact of a previous aggravated felony conviction results in a drastically greater maximum sentence. Therefore, the United States Constitution requires that such fact must be alleged in an indictment and proved to a jury beyond a reasonable doubt.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. . . . or be deprived of life, liberty or property, without due process of law. . . . " The Sixth Amendment provides that "[i]n all

criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . , and to be informed of the nature of the accusation against him; to be confronted with the witnesses against him;. . . . "

Thus, a federal felony defendant has the right to be charged by a grand jury indictment, which indictment must " ' . . . set forth all the elements of the offense intended to be punished.' " *Hamling v. United States*, 418 U.S. 87, 117 (1974), *quoting United States v. Carll*, 105 U.S. 611, 612 (1882)). Furthermore, once charged, the defendant has the right to compel the government to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). And, the defendant has a right to have these facts determined by a jury. *United States v. Gaudin*, 515 U.S. 506, ___, 115 S.Ct. 2310, 2314 (1995).

B. The Punishment Defines the Crime.

In Professor Wayne LaFave's words: "a crime is made up of two parts, forbidden conduct, and a prescribed penalty. The former without the latter is no crime." 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 1.2(d) (1986); *see also United States v. Evans*, 333 U.S. 483, 485, 495 (1948); *United States v. Eaton*, 144 U.S. 677, 686 (1892). Indeed, this Court has noted that, by "the severity of the penalty authorized," "the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank v. United States*, 395 U.S. 147, 149 (1969).

Crimes are categorized by the maximum penalties prescribed for the offense, e.g., capital offense, felony offense, or petty offense. This notion is embodied in the plain words of the Constitution, where the right to grand jury indictment depends on the extent of the potential penalty for the offense, and the quantum of process due is likewise predicated on the possible penalty.

The right to jury trial depends on the "severity of the maximum authorized penalty," *Baldwin v. New York*, 399 U.S. 66, 68 (1970); *see also id.* at 73-74, because "[i]n such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank*, 395 U.S. at 149. *See Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968); *Schick v. United States*, 195 U.S. 65, 68 (1903). The maximum potential penalty also governs the right to indictment by a grand jury. *Ex parte Wilson*, 114 U.S. 417, 423 (1885) ("[W]hether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow-citizens depends upon the consequences to himself if he shall be found guilty. . . . ") (citing Blackstone, James Madison, and the Journal Massachusetts Convention 1788).

The degree of proof required depends as well on the potential punishment. *See, e.g., Addington v. Texas*, 441 U.S. 418, 423-26 (1979). "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties," where "the burden of proof is a mere preponderance of evidence." *Id.* at 423. "In a criminal case on the other hand, the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof . . . beyond a reasonable doubt." *Id.* at 423-24. This Court noted: "There are significant reasons

why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense." *Id.* at 428.

With regard to the penalty of denaturalization, this Court has said, " . . . in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside – the evidence must indeed be 'clear, unequivocal, and convincing' and not leave the issue in doubt." *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (citations omitted). Likewise, with regard to the penalty for deportation, "it does not . . . follow that a person can be banished from this country upon no higher degree of proof than applies in a negligence case." *Woodby v. INS*, 385 U.S. 276, 285 (1966). Under the reasoning of these cases, where, as here, the resolution of the fact issue can result in imprisonment for twenty years, the degree of proof must be beyond a reasonable doubt.

C. The Common Law and State and Federal Practice.

At common law, and into the twentieth century, it was nearly universally held that prior convictions must be alleged in an indictment or information[22], and proved

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[22] This Court has held that the right to a grand jury indictment was not incorporated by the Fourteenth Amendment. Thus defendants in state court do not have the right to an indictment. *Hurtado v. California*, 110 U.S. 516, 538 (1884). The Fifth Amendment right to grand jury indictment of course does apply to this federal prosecution. The point is that states have traditionally required the allegation of a prior conviction to be present in whatever formal charging document

beyond a reasonable doubt to a jury. This Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, ___U.S.___, 116 S.Ct. 2013, 2017 (1996). The Constitution "must be read in the light of the common law." *Schick*, 195 U.S. at 69. The common law "does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' " *In re Winship*, 397 U.S. at 361-62 (citations omitted). At the time of the passage of the United States Constitution and the Bill of Rights, the common understanding was that facts, such as prior convictions, which formed the basis for an increase in the maximum sentence, must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

In *People v. Sickles*, 156 N.Y. 541, 51 N.E. 288 (1898), the court was faced with a recidivist statute that raised the maximum sentence. The court noted

> The indictment . . . must bring the case within the statute by setting forth the facts depended upon for the imposition of the severer punishment . . . This is necessary in penal proceedings, in order that the defendant may be informed of the charge which he is called upon to meet. . . . it is in accord with all just penal legislation. "In a case such as this, the charge is not merely that the prisoner has committed the offense specifically described, but that,. . ., his second offense has subjected him to an enhanced penalty. . . . **it was an essential ingredient of the aggravated**

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and procedure each state utilized, which in this case is a grand jury indictment.

> **offense, . . . , that the alleged felony was committed after a former conviction . . . and that the prior conviction entered into and made a part of the offense of which the accused was convicted."**

Id. at 544-45, 51 N.E. at 289 (emphasis added & citations omitted). The court added that "as 'a more severe penalty is denounced by the statute for a second offense, all the facts to bring the case within the statute must be established upon the trial.' " *Id.* at 545, 51 N.E. 289 (citation omitted). The court further noted that in England "the former conviction is regarded as an element entering into the grade of the guilt of the defendant, inasmuch as proof must be made of it, and the jurors must deliver their verdict upon that proof." *Id.* at 546, 51 N.E. at 289-90.

The court went on to state that

> In a sense, the prior offense was not an element of the second offense, for they were disconnected acts; but the prior conviction so affected the grade of the prisoner's guilt and the degree of his liability to punishment that, in that sense, it entered into the offense of which he is convicted . . . **as a necessary and logical conclusion, where an increased punishment is prescribed . . . the prior conviction enters as an ingredient into the criminality of the prisoner** . . . it aggravates the guilt of the prisoner, and . . . subjects him to an increased punishment . . .

Id. at 546-47, 51 N.E. 290 (emphasis added).

Later, after New York changed its laws and allowed for a bifurcated, post-verdict proceeding, initiated by information, the government had argued that the burden

to prove the prior conviction should be a preponderance because this was not a trial on guilt or innocence. The court responded that the proper burden remains beyond a reasonable doubt because

> [t]he proceeding determines a fact upon which depends the extent of his imprisonment. To be sure, his guilt of the crime for which he was indicted has already been determined, . . . [but] [t]he **fundamental question is the same, and the rights of the defendant are entitled to the same protection in the one case as in the other.**

People v. Brennan, 242 N.Y.S. 692, 694-95 (1930) (emphasis added). The decisions in *Sickles* and *Brennan* reflect the common law rule as well as the overwhelming authority at the time.[23]

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[23] The cases in accord with the position that prior convictions which raise the statutory maximum sentence must be alleged in the indictment and/or proved to a jury beyond a reasonable doubt are too numerous to list *in toto*, but some of the more noteworthy cases are: *Cosgriff v. Craig*, 195 N.Y. 190, 194-95, 88 N.E. 38, 39 (1909) (if fact of prior conviction causes increased sentence in range already subject to court's discretion, no violation of individual rights, but if that fact increases the maximum penalty that fact is an integral part of the offense itself); *Maine v. McClay*, 146 Me. 104, 107-08, 78 A.2d 347, 350 (1951) (rule so "generally held" that a detailed review of the authorities would serve no useful purpose"; relies upon "*Tuttle v. Commonwealth*, 2 Gray, Mass., 505, at page 506: –" which states the rule "is required by a rule of the common law, and by our own Declaration of Rights, art. 12.") (additional citations & internal quotation marks omitted); *People v. McDonald*, 233 Mich. 98, 102, 105, 206 N.W. 516, 518, 519 (1925) (basis for rule is that the "nature of the punishment which the statute provides may be inflicted is presumed to depend on the enormity of the offense of which the accused has been convicted"); *Long v. State*,

Federal authority has also held that facts, such as prior convictions, which increase the maximum sentence, must be alleged in the indictment or information and

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36 Tex. 6, 10 (1871) (a contrary position would "cut away so much of the pillars of our liberty"); *Riggins v. Stynchcombe*, 231 Ga. 589, 592-93, 203 S.E.2d 208, 212 (1974) (even under a bifurcated procedure must allege prior in indictment, based on the right to grand jury indictment); *People v. Casey*, 399 Ill. 374, 378-79, 77 N.E.2d 812, 815 (1948) ("We can perceive of no reason" for a different procedure because the fact at issue "inflicts a penalty of additional years upon a defendant"; to hold otherwise "would be contrary to the law of what is right and just"); *State v. Smith*, 106 N.W. 187, 188-89 (Iowa 1906) (the rule is supported by "the uniform current authority"; a contrary result "would amount to a travesty"); *State v. Pennye*, 102 Ariz. 207, 209, 427 P.2d 525, 527 (1967) (relies upon the presumption of innocence); *State v. Martin*, 162 Wis.2d 883, 900-01, 470 N.W.2d 900, 907 (1991) (The rule is required to "meet the due process requirements of a fair trial. When the defendant is asked to plead, he is entitled to know the extent of his punishment."); *State v. Furth*, 5 Wash.2d 1, 11-19, 104 P.2d 925, 930-933 (1940) (extended discussion of the case law and history; finding it is the "general rule."); *State v. Ruble*, 77 N.D. 79, 90, 40 N.W.2d 794, 800 (1950) (reviews history and concludes it is the "general rule recognized in most jurisdictions"); *State v. Waterhouse*, 209 Or. 424, 428-433, 307 P.2d 327, 329-331 (1957) (detailed history of common law); *State v. Cobb*, 2 Ariz.App. 71, 76, 406 P.2d 421, 426 (1965) (relies upon the presumption of innocence); *Robbins v. State*, 219 Ark. 376, 380-81, 242 S.W.2d 640, 643 (1951) (general rule; collection of authority); *Lockmiller v. Mayo*, 88 Fla. 96, 98-99, 101 So. 228, 229 (1924) (rule applies whether the prior conviction is described as "merely an increased punishment" or as "a new offense"); *Evans v. State*, 150 Ind. 651, 50 N.E. 820 (1898) (collection of authorities); *State v. Eichler*, 248 Iowa 1267, 1270-73, 83 N.W.2d 576, 577-79 (1957) (good collection of authority); *Roberson v. State*, 362 P.2d 1115, 1119 (Okla. Crim. App. 1961) (contrary position violates right to grand jury indictment).

proved to a jury beyond a reasonable doubt. In *Massey v. United States*, 281 F. 293, 297-98 (8th Cir. 1922), the court noted:

> Statutes providing for greater punishment of second or subsequent offenses by the same person have long been in force in this country and in England . . . and are to be found in the legislation of nearly every state in the Union. It is the established rule, under such statutes, unless the statute designates a different mode of procedure, that, if the prosecutor desires to invoke the severer punishment provided as to second or subsequent offenders, the indictment or information must allege the fact of the prior conviction, and the allegation of such conviction must be proved in the trial to the jury. . . . The statement of a prior conviction is regarded as a part of the description and character of the offense intended to be punished, and as an essential ingredient of such aggravated offense. The accused is entitled to have the exact charge against him stated in the indictment or information, and to have the verdict of the jury upon the fact of a prior conviction for the same offense, and of his identity with the person so convicted, and it is the duty of the government which prosecutes to allege and prove the existence of the prior conviction of the accused as a fact that may cause a severer penalty to be imposed.

(Citations omitted; the court cited forty-two separate cases and seven treatises.)

In *Singer v. United States*, 278 F. 415, 420 (3rd Cir. 1922), *cert. denied*, 258 U.S. 620 (1922), the court held that

> While in common parlance a verdict of guilty is said to be a conviction, it must be given its strict legal meaning when a second offense is made a distinct crime, carrying with it heavier penalties. The authorities overwhelmingly establish, first, that in the legal sense a conviction is a judgment on a plea or verdict of guilty; . . . , the indictment, charging the accused of being a second offender, must set forth the fact of the prior conviction, as that is an element of the offense in the sense that it aggravates the offense described in the indictment, and authorizes the increased punishment.

This Court has also required that facts that increase the maximum punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

D. The Supreme Court Authority.

This Court's direct authority is that facts which increase the maximum sentence must be alleged in the indictment and proved to a jury beyond a reasonable doubt. First, in *Schooner Hoppet and Cargo v. United States*, 11 U.S. 389 (1813), the Court, in an opinion written by Chief Justice John Marshall, stated:

> The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and **state such a crime as will justify the judgment to be pronounced.**

> The reasons for this rule are,
>
> 1st. That the party accused may know against what charge to direct his defence.
>
> 2d. **That the Court** may see with judicial eyes that the fact, alleged to have been committed, is an offence against the laws, and **may also discern the punishment annexed by law to the specific offence.**

Id. (emphasis added). Thus, this Court long ago held that one should be able to tell from the facts alleged in the indictment or information the maximum sentence at issue. The Court also held that, though there was a violation found, the sentence could not exceed that authorized by the allegations in the information. *Id.* at 394.

In *Chandler v. Fretag*, 348 U.S. 3 (1952), the Court held that a defendant had the right to an attorney in a case where a prior conviction increased the maximum penalty. The Court treated the issue as controlled by the rights a defendant has in a criminal trial as explicated in *Powell v. Alabama*, 287 U.S. 45 (1932).

In *Chewning v. Cunningham*, 368 U.S. 443 (1962), the Court was again faced with a recidivist charge in which the defendant, after being charged by information, was sentenced to ten years in prison after a jury trial on the issue. Again, the defendant claimed he had a right to an attorney on the issue. This Court agreed. The Court noted the court below conceded "that a proceeding under the recidivist statute was 'criminal' and that in that proceeding the accused was entitled to most of the protections afforded defendants in criminal trials, . . . " *Id.* at 445. The Court referred to the recidivist allegation as a "charge":

> "It is 'The nature of the charge' . . . that underlines the need for counsel." *Id.* at 446. The Court also refers to the proceeding as a "trial": "[w]e only conclude that a trial on a charge of being a habitual criminal is such a serious one . . . **that the rule we have followed concerning the appointment of counsel in other types of criminal trials is equally applicable here.**" *Id.* at 447 (emphasis added).

In *Specht v. Patterson*, 386 U.S. 605, 609 (1967), the Court, following the unbroken line of common law decisions referred to above, found that a defendant in a hearing under a recidivist statute is entitled to the full panoply of rights to ensure a fair trial. This is because the hearing requires "a new finding of fact," and because the potential consequence was "criminal punishment. . . . " *Id.* at 608. The Court concluded:

> **'A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial,** including the right to confront and cross-examine the witnesses against him.' . . .
>
> . . . The case is not unlike those under recidivist statutes where an habitual criminal issue is 'a distinct issue' (*Graham v. State of West Virginia*, 224 U.S. 616, 625, . . .) on which a defendant 'must receive reasonable notice and an opportunity to be heard.' *Oyler v. Boles*, 368 U.S. 448, 452, . . . ; *Chandler v. Fretag*, 348 U.S. 3, 8, . . . Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against

> him, have the right to cross-examine, and to offer evidence of his own.

Specht, 386 U.S. at 609-10 (emphasis added & some citations omitted).

This Court has never altered this view. The rule is that if the state establishes a maximum penalty based on a certain set of facts, those facts must be alleged and proved beyond a reasonable doubt in a jury trial. In other words, the legislative body can determine what facts are important enough to subject one to liability for a certain range of punishment. But once it does so, those facts must be alleged in a formal charging instrument required for any criminal accusation, and proved beyond a reasonable doubt in a jury trial. *Cf. McMillan*, 477 U.S. at 98 (Stevens, J., dissenting).

A comparison of this Court's decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), elucidates this point. In *Mullaney*, the Maine statute provided that for a defendant to face a life sentence, the state must prove that he acted with "malice aforethought." In Mullaney's trial, the jury was told to presume the existence of that fact. Thus, the state had deemed "malice aforethought" to be a fact so important that it must be proved to warrant the enhanced sentence. Therefore, the state was required to prove that element beyond a reasonable doubt. *Patterson*, 432 U.S. at 216 (discussing holding of *Mullaney*); *see also id.* at 221 (Powell, J. dissenting) (same).

The Court in *Mullaney* noted:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Mullaney, 421 U.S. at 698.

In *Patterson*, the Court was faced with a statute that exposed the defendant to the full range of punishment for second degree murder if the state proved the defendant both possessed the intent to cause death and did cause the death of another. The state explicitly created an affirmative defense to the charge where the defendant acted under extreme emotional disturbance for which there was an adequate cause. The Court noted that "[i]t is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances." *Id.* at 206.

The Court also found that the states are free to define offenses, and that the reasonable-doubt standard applies to the state's definition. In other words, the state is free to determine what facts justify a certain punishment, and those facts must be proved beyond a reasonable doubt;

but even this rule was subject to constitutional limits. *Id.* at 211 n.12. The Court then examined the statute to determine if it went beyond the constitutional limits. The Court was addressing the concern that traditional elements would be turned into affirmative defenses to evade the requirements of *Winship*. The Court looked to the common law, and found that the affirmative defense in *Patterson* was a new creation. Furthermore, the closest analogue, the defense that the defendant acted under "the heat of passion upon sudden provocation," was not traditionally an element of the offense that the prosecution bore the burden of proving, despite recent trends. *Patterson*, 432 U.S. at 202.

Here, the common law is clear that traditionally the government does bear the burden of proving the prior convictions in a jury trial if the convictions result in a higher penalty range. Here, the legislature made the higher penalty range applicable only if the fact of an aggravated felony conviction is proved. There certainly is no explicit legislative enactment as in *Patterson* indicating that the defendant faces the higher punishment unless he can prove he has no felony conviction.

This Court's decision in *Addington* also clearly indicates that the law requires proof beyond a reasonable doubt of facts that would increase the maximum punishment. In *Addington*, the Court required a higher standard of proof than a preponderance of the evidence in a civil commitment procedure. *Addington*, 441 U.S. at 432-33. The Court pointed out that a greater standard of proof than the preponderance standard applicable in negligence cases is required when the government seeks to take away a non-monetary, or liberty interest, such as

when it seeks to deport or denaturalize a citizen. *Id.* at 423-24. The Court did not require proof beyond a reasonable doubt specifically because: 1) the loss of liberty was not punitive, *id.* at 428; 2) "the layers of professional review and observation of the patient's condition, and the concern of the family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected," i.e., the confinement depends on the patient's mental condition, and if he gets better, he can go home, *id.* at 428-29; 3) if the patient is erroneously released, he could suffer great harm, *id.*; and 4) the determinative issue is so complex that, unlike the factual issues in a criminal case, "there is a serious question whether a state could ever prove [it] beyond a reasonable doubt . . . " *Id.* at 429. Here, the loss of liberty is 1) punitive; 2) for a definite term of years; 3) the imprisoned person would not be harmed by his release; and 4) the determinative issue is a straightforward fact issue capable of resolution by jurors using the beyond-a-reasonable-doubt standard of proof. Thus, *Addington* requires proof beyond a reasonable doubt for facts which increase the statutory maximum.

McMillan v. Pennsylvania, 477 U.S. 79 (1986), provides further support for Petitioner's position. There the Court was faced with a statute that required a mandatory minimum sentence if a sentencing court found, by a preponderance of the evidence, that the defendant had visibly possessed a firearm during the commission of the offense. Significantly, the mandatory minimum sentence was within the range of punishment the defendant already faced based on the facts found by the jury. The Court, in a five to four decision, found that, under this scheme, the

Constitution did not require the state to prove this fact issue beyond a reasonable doubt. *Id.* at 85-86. The majority, on no less than four separate occasions, emphasized that the finding of fact at issue did not increase the maximum sentence beyond that already applicable based on the facts found by the jury beyond a reasonable doubt. *Id.* at 82, 83, & 87-88. The Court noted that the statute

> . . . neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [The statute] "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.

Id. at 88. In this case of course, the potential sentence has increased from a maximum of two years to a maximum of twenty years based on the existence *vel non* of a particular fact. Thus, that fact must be proved beyond a reasonable doubt. This fact finding is the "tail which wags the dog." It is the most important fact issue under the statute.

Furthermore, the majority to some extent relied upon the fact that the state clearly, explicitly, and unequivocally stated in the statute that the fact issue in question, the use of a firearm, "shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction," and that the issue "shall be determined at

sentencing . . . by a preponderance of the evidence . . . . " *Id.* at 81 n.1. To the extent that the Court in *McMillan* relied on Pennsylvania's explicit declaration that visible possession of a firearm was not an element of the offense, *McMillan* is distinguishable from the case at bar where there is no such declaration. On the contrary, as noted above, Congress has referred to Subsection (b) of 8 U.S.C. § 1326 as an "offense." *See* discussion in Section I. B., *supra*.

The majority in *McMillan* also relied upon the fact that "petitioners do not contend that the particular factor made relevant here – visible possession of a firearm – has historically been treated 'in the Anglo-American legal tradition' as requiring proof beyond a reasonable doubt . . . . " *Id.* at 90. Here, the fact issue – whether the defendant has previously been convicted of a prior conviction – has historically been treated in the Anglo-American legal tradition as requiring proof beyond a reasonable doubt.

The Constitution guarantees that every fact that must be proved to increase the statutory maximum punishment must, in a federal case, be alleged in the indictment, and proved beyond a reasonable doubt to a jury.[24] That guarantee was violated in this case.

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[24] If this were not the case, how could a court comply with Rule 11(c) of the Federal Rules of Criminal Procedure, which requires the district court to determine whether the defendant understands the maximum possible penalty provided by law before accepting a plea of guilty to an offense alleged in an indictment or information? The court would not know that until the sentencing hearing, if the issue were merely a sentencing issue.

Of course, this Court need not reach the constitutional issues in this case if the Court decides the case as a matter of statutory construction as urged in Section I., *supra*. Likewise, the Court may avoid the constitutional issues in this case by exercising its supervisory power over the lower federal courts. *E.g., Davis v. United States*,

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More importantly, a defendant would be forced to make the decision to plead guilty or go to trial based on his understanding of the offense alleged and the potential penalty, only to have the penalty increase drastically after he has foregone his rights. The subsequent imposition of penalty will then be based on facts to which the defendant did not plead guilty.

Also, a court would not know how to proceed under a statute under which certain fact findings raise the penalty from a petty offense to a felony offense such as 18 U.S.C. § 2701. In 18 U.S.C. § 2701, Congress created a statute that is divided into three parts: "(a) Offense," "(b) Punishment," and "(c) Exceptions." The "punishment" section establishes a punishment of either six months under (b)(2), one year under (b)(1)(A), or two years under (b)(1)(B). Certain facts determine the differences in maximum penalties. The defendant does not have a right to indictment if he ends up being sentenced under (b)(2) or (b)(1)(A). But he would have a right to an indictment under (b)(1)(B). Likewise the defendant would not have a right to a jury trial under (b)(2) but he would have a right to a jury trial if sentenced under (b)(1)(A) or (b)(1)(B). If it is not necessary to allege in the indictment the facts that would justify the higher maximum sentences, a court would not know, until after the trial, and at sentencing, whether the defendant had a right to a jury trial and/or to a grand jury indictment in the first place. It makes far greater sense to adhere to the common law view, and that expressed by this Court so long ago in *Schooner Hoppet*, that it is a fundamental requisite that the indictment or information set out the facts necessary to justify the maximum punishment so that the court, and the defendant, will be able to tell from the indictment or information what is at stake.

160 U.S. 469, 484-93 (1895) (requiring proof beyond a reasonable doubt to prove defendant sane in federal case); *compare Leland v. Oregon*, 343 U.S. 790, 797 (1952) (*Davis* decision is a federal rule, not constitutional doctrine). The Court's supervisory powers must be guided by the common law, state and federal authority, and considerations of justice. *See United States v. Hasting*, 461 U.S. 499, 505 (1983) ("[G]uided by considerations of justice, . . . and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.") (citation and internal quotation marks omitted); *cf. Victor v. Nebraska*, ___U.S.___, 114 S.Ct. 1239, 1248 (1994) (recognizing supervisory power over federal courts and implying that supervisory power might be used to require certain form of reasonable doubt instruction, over and above constitutional requirements). These considerations compel the result that 8 U.S.C. § 1326(b)(1) and (b)(2) sets forth separate offenses, and that each of the facts set forth therein must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals should be reversed, and the case should be remanded to that court with instructions to vacate the Petitioner's sentence and to remand to the district court for resentencing.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Title 8, United States Code, Section 1326

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported to excluded and deported, and thereafter

(2) enters, attempts to enter or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (b) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

APPENDIX B

APPENDIX B

Amendments to Title 8, United States Code, Section 1326

1952 Version

§ 1326. Reentry of deported alien

Any alien who –

(1) has been arrested and deported or excluded and deported, and thereafter.

(2) enters, attempts to enter, or is at any time found in, the United States, unless (a) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

1988 Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, ~~A~~any alien who –

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (a) prior to his reembarkation at a place outside of the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated

felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.

1990 Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported, or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

~~**shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000,**~~ **shall be fined under title 18, or imprisoned not more than 2 years, or both.**

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.

1994 Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported, or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (Other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than ~~15~~ 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

1996 I Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported, ~~or~~ has been excluded and deported, or has departed the United States while an order of exclusion or deportation is outstanding, and thereafter.*

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under †Title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under †Title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such †Title, imprisoned not more than 20 years, or both; or

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during (or not during) a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation

order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that –

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

*This period is in the original.

1996 II Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of ~~deported~~ **removed** alien; criminal penalties for reentry of certain ~~deported~~ **removed** aliens.

(a) Subject to subsection (b) of this section, any alien who –

(1) has been ~~arrested and deported, or excluded and deported~~, **denied admission, excluded, deported, or removed** or has departed the United States while an order of ~~exclusion or deportation~~ **exclusion, deportation, or removal** is outstanding, and thereafter.

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously ~~excluded and deported~~ **denied admission and removed,** unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose ~~deportation~~ **removal** was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes

against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose ~~deportation~~ **removal** was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both; ~~or~~

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence~~.~~; or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term ~~"deportation"~~ **"removal"** includes any agreement in which an alien stipulates to deportation removal during (or not during) a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that –

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.
